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IN THE

Supreme Court of the United States

October Term, 1964

No. 338

RENEE BINS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WALTERS, MOORE & COSTANZO
and RICHARD R. BOOTH
Attorneys for Petitioner
1005 Ainsley Building
Miami, Florida 33132

INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTE INVOLVED	3
RULE INVOLVED	3
STATEMENT OF THE CASE	4
ARGUMENT AMPLIFYING REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT	7
CONCLUSION	9
CERTIFICATE OF SERVICE	9
APPENDIX	
The Opinion of the Court of Appeals	App. 1
Judgment	App. 5
Order Denying Rehearing	App. 6

CITATIONS

Cases

	Page
Dyer v. MacDougall, 201 F. 2d 265 (2nd Cir. 1952)	7
Hammond v. United States, 127 F. 2d 752 (D.C. Cir. 1942)	7
Hinton v. United States, 196 F. 2d 605 (D.C. Cir. 1952)	7
Magee v. Coca-Cola Company, 232 F. 2d 596, at 599 (7th Cir. 1956)	8
Ramsey v. United States, 263 F. 2d 805 (9th Cir. 1959)	7
United States v. Masiello, 235 F. 2d 279 (2nd Cir. 1956)	8
United States v. Murphy, 222 F. 2d 698 (2nd Cir. 1959)	7

Statutes and Rules

18 U.S.C. § 1001	3
Rule 29(a), Federal Rules of Criminal Procedure	3

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Petitioner, by and through her undersigned counsel, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, affirming the judgment of the United States District Court for the Southern District of Florida, Miami Division, as to Count Three of the indictment, convicting petitioner and providing a sentence of imprisonment.

(In this petition references to the transcript of record will be by a "T" followed by the page number.)

OPINIONS BELOW

The opinion of the Court of Appeals, set forth in the Appendix, p. 1, is reported in the advance sheets at 331 F. 2d 390. Petition for rehearing was denied by per curiam order without opinion, which order is set out in the Appendix, p. 6. The District Court rendered no opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on May 5, 1964, Appendix, p. 5; petition for rehearing was denied on July 2, 1964, Appendix, p. 6. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1), and Rule 19.1(b) of the Revised Rules of the Supreme Court of the United States (adopted April 12, 1954; effective July 1, 1954) entitled Considerations Governing Review on Certiorari, in that the Court of Appeals has rendered a decision in conflict with the decisions of at least two other courts of appeals on essentially the same question; or, has decided an important question of federal law which has not been but should be settled by this Court; or, has so far sanctioned a departure by the United States District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

QUESTION PRESENTED

MUST A MOTION FOR JUDGMENT OF ACQUITTAL BE GRANTED WHEN ALL OF THE EVIDENCE AND TESTIMONY NEGATIVES AN ESSENTIAL ELEMENT OF THE CRIME CHARGED?

Or, otherwise stated,

MAY A CRIMINAL CONVICTION BE SUSTAINED ON THE THEORY THAT THE JURY MIGHT DISBELIEVE ALL THE TESTIMONY AS TO AN ESSENTIAL ELEMENT OF THE CRIME AND FIND THE NEGATIVE OF THAT TESTIMONY TO BE TRUE?

STATUTE INVOLVED

18 U.S.C. § 1001 is the statute under which the charge was brought; it provides in pertinent part as follows:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully * * * conceals or covers up by any trick, scheme or device a material fact * * * shall be fined not more than $10,000 or imprisoned not more than five years, or both.

RULE INVOLVED

Rule 29. Motion for Acquittal

(a) Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the

evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

STATEMENT OF THE CASE

The petitioner, RENEE BINS, and her partner d/b/a Seventh Avenue Realty, were real estate brokers who represented one Daniel McPhaul in connection with the purchase of a house on which an FHA insured mortgage was to be placed with J. I. Kislak Mortgage Corporation of Florida. Prior to the closing the petitioner and her partner loaned to the said Daniel McPhaul the sum of $300.00 which was in the form of a check. Daniel McPhaul cashed the check at the closing along with three other checks so that the money received by the seller from McPhaul at the closing consisted of the four checks plus some cash.

The petitioner stands convicted on Count Three of the indictment which charges:

> That on or about February 7, 1961, at Miami, Dade County, in the Southern District of Florida, in a matter within the jurisdiction of the Federal Housing Administration,
>
> BLANCHE RESSA
> RENEE BINS and
> DANIEL ROSSO

> for the purpose of influencing the action of the Federal Housing Administration, did wilfully and knowingly conceal from the Federal Housing Administration, and cover up by a scheme and device, material facts, to-wit, that Daniel McPhaul was about to become, and did become indebted to Blanche Ressa and Renee Bins doing business as Seventh Avenue Realty, Miami, Florida, in the amount of $300.00 which said sum was loaned to him by Blanche Ressa and Renee Bins doing business as Seventh Avenue Realty for the purpose of enabling him to complete the purchase of certain property upon which a mortgage loan was made by J. I. Kislak Mortgage Corporation of Florida which loan was offered to the Federal Housing Administration for insurance; in violation of Title 18, United States Code, Section 1001.

Because of the wording of the third count of the indictment, quoted in full, **supra**, the petitioner made a motion for a bill of particulars (T. 20, 21), which was granted (T. 33, 34), requiring the government to state whether the $300.00 loaned to McPhaul was needed by him to make the closing. This issue as thus narrowed was stated by the prosecutor in his summation to the jury (T. 547), to wit: "The only question here is what was it [the check] for. Was it for the closing? Or was it for personal needs?" In his charge to the jury the District Judge admonished the jury that a conviction was permissible on this count only if the jury found that the $300.00 check cashed at the closing was for closing (T. 575).

Thus it was incumbent upon the government to prove beyond a reasonable doubt that the $300.00 was given to McPhaul by the petitioner because McPhaul did not have sufficient money for the closing of the loan in question, and that in order to get this third count before the jury the government was required to adduce substantial affirmative evidence to establish a prima facie case that the $300.00 loan was needed by McPhaul for the closing.

The only witness for the prosecution on this charge was Daniel McPhaul who testified that he had sufficient funds to close (T. 235) and that he had those funds before the occasion arose for the $300.00 (T. 237) and he clearly and specifically testified that he did not need the $300.00 to close (T. 240, 270). On direct testimony when being questioned by the prosecutor, McPhaul testified as follows:

Q [By the prosecutor] You didn't need this money to close, I understood you to say?
A No, sir, I did not. (T. 240)

On cross-examination McPhaul was asked the following question to which he gave the following answer:

Q [By Mr. Booth, defense counsel] Now, when you went down to the closing, I believe you said that even without this check from Seventh Avenue Realty [the partnership consisting of the petitioner and Blanche Ressa], you had the necessary money to close; is that right?
A Yes, I did. (T. 270)

At the end of the government's case in chief petitioner's counsel moved the District Judge to grant a judgment of acquittal as to this count (T. 338).

The defense then put on its case following which the government presented its rebuttal witnesses and at the conclusion of all the evidence petitioner's counsel again moved for a judgment of acquittal on this count, among others (T. 532).

ARGUMENT AMPLIFYING REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The petitioner submits that the decision of the Court of Appeals in question here is contrary to the following cases on the following points: **Hinton v. United States,** 196 F. 2d 605 (D. C. Cir. 1952), which holds that self-contradiction by the government's own witness is fatal where there is no other evidence of guilt; **United States v. Murphy,** 222 F. 2d 698 (2nd Cir. 1955), **cert. denied** 76 S. Ct. 155, which holds that in the absence of evidence of guilt in a criminal action the indictment must be dismissed or a verdict of acquittal directed; **Ramsey v. United States,** 263 F. 2d 805 (9th Cir. 1959), which holds that uncontradicted testimony cannot be arbitrarily rejected; **Hammond v. United States,** 127 F. 2d 752 (D. C. Cir. 1942), which holds that where all substantial evidence is consistent with innocence a conviction on such evidence must be reversed; and **Dyer v. MacDougall,** 201 F. 2d 265 (2nd Cir. 1952), which although a civil case, is exactly on point, Judge Learned Hand speaking for the Court at page 269 having said:

> Nevertheless, although it is therefore true

> that in strict theory a party having the affirmative might succeed in convincing a jury of the truth of his allegations in spite of the fact that all the witnesses denied them, we think it plain that a verdict would nevertheless have to be directed against him.

This language was quoted with approval and followed by the Seventh Circuit in **Magee v. Coca-Cola Company**, 232 F. 2d 596, at 599 (7th Cir. 1956). The applicability of the **Dyer** and **Magee** cases cannot be seriously questioned since the test for a trial judge to apply in determining what inferences a jury may be permitted to make is the same in civil and criminal cases. **United States v. Masiello**, 235 F. 2d 279 (2nd Cir. 1956), **cert. denied** 77 S. Ct. 100.

Thus we are confronted with a situation presenting a question vital to the effective administration of criminal justice in the district courts; one the resolution of which will have importance well beyond the facts and the party involved; one involving exceptionally important principles which will affect and guide the lower federal courts throughout the country. We submit that it is basic that the definition of the duties of the judge on one hand and the jury on the other hand must be a clear one to the end that a case cannot get beyond a motion for judgment of acquittal at the close of the government's case in chief by the Court's disregarding the fact that the prosecution's sole witness testified against the charge, and to the further logical end that person cannot be convicted by the jury's drawing a negative inference from all the testimony offered by the prosecution and defense when such testimony refutes in all essential par-

ticulars the charge of the indictment? We most respectfully submit that such a definition should be made if justice is to prevail in the district courts.

CONCLUSION

The premises considered petitioner prays that a writ be granted and that her case be heard.

RICHARD R. BOOTH and
WALTERS, MOORE & COSTANZO
1008 Ainsley Building
Miami, Florida 33132
Attorneys for Petitioner

By _____
Richard R. Booth

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing petition were served on each of the following this ___ day of July, 1964, in the manner indicated: United States Attorney, Miami, Florida, by personal service; Solicitor General, United States Department of Justice, Washington, D. C., by United States mail, postage prepaid.

_____
Richard R. Booth

APPENDIX

OPINION OF THE COURT OF APPEALS

[TITLE OMITTED]

(May 5, 1964)

Before BELL, Circuit Judge, and INGRAHAM,* District Judge.

INGRAHAM, District Judge: Appellant was convicted, on three counts, of making false statements to the Federal Housing Administration in violation of 18 U.S.C.A. Secs. 1001,1010. Appellant contends (1) that both counts one and two are fatally defective because they fail to contain an allegation of materiality; (2) that counts one and two are fatally defective in that they each charge at least two offenses in violation of Rule 8(a), Federal Rules of Criminal Procedure; (3) that the trial court erred in denying a continuance after the Government failed to make timely production of the essential documents involved in the charges; and (4) that the Government failed to prove essential elements of the offenses charged in counts one and two, and that there was an entire failure of proof as to count three.

We find no merit in points (1), (3), or (4). Although materiality is not explicitly alleged in the indictment, it is alleged in substance. And this court recognizes

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* Judge Cameron, the third judge constituting the Court originally hearing this case, died after argument but before decision. Consequently, this decision and opinion is rendered by a quorum pursuant to Title 28, USCA, Secs. 46(c) and (d).

that to be sufficient. *Rolland v. United States*, 200 F.2d 678 (5th Cir. 1953), ce denied, 345 U.S. 964 (1953). Nor was there error in tn 'enial of the requested continuance. The testimony o 'ppellant's own witness, the document examiner, indicates that there was sufficient time to prepare expert opinions and conclusions. In the light of this testimony, the denial of the continuance was neither an abuse of discretion nor harmful error. And having carefully examined the record in view of the arguments made by appellant, we are convinced that there is sufficient evidence to support the jury finding. There was no failure of proof.

The second point advanced by appellant, however, requires a more thorough discussion. Rule 8(a), Federal Rules of Criminal Procedure, [1] permits the joinder of two or more offenses in the same indictment, but requires that each be stated in a separate count. Counts one and two of the indictment charge violations of 18 U.S.C.A. Sec. 1010.[2] The essence of a violation of this section is the uttering and publishing of false docu-

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[1] "(a) *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

[2] Sec. 1010. *"Federal Housing Administration transactions.*

Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Administration, makes, passes, utters, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income, shall be fined not more than $5,000 or imprisoned not more than two years, or both."

ments with the intent to influence the F.H.A. *Cohen v. United States*, 178 F.2d 588, 591 (6th Cir. 1949), cert. denied, 339 U.S. 920 (1949). Each violation should be set out in a separate count. But in the indictment under consideration each of counts one and two alleges that defendant did make, pass, utter, and publish and cause to be made, passed, uttered and published certain statements, known to be false; and that said statements were contained in "Request for Verification of Employment", FHA Form 2004G (dated December 24, 1960, in count one, and June 30, 1960, in count two), and "Supplement to Mortgagee's Application; and Mortgagor's Statement", FHA Form 2004C (dated December 29, 1960, in count one, and July 7, 1960, in count two).

Appellee urges that the acts alleged are disjunctive rather than duplicitous, and that the two separate documents were only cited to add specificity. However, it is well settled that the test for determining whether several offenses are involved is whether identical evidence will support each of them, and if any dissimilar facts must be proved, there is more than one offense. *Blockburger v. United States*, 284 U.S. 299 (1932); *Morgan v. Devine*, 237 U.S. 632 (1915). And it can hardly be denied that the making, passing, uttering, and/or publishing of F.H.A. Form 2004C requires proof of a fact other than that required to prove the making, passing, uttering, and/or publishing of F.H.A. Form 2004G. The most obvious additional fact as to each document is the fact that they are different documents. Nor is it of any consequence that all of the documents referred to in each count are part of a single transaction. The documents were executed on different dates. Whether a continuous transaction results in

the commission of but a single offense or separate offenses is not dependent on the number of unlawful motives in the mind of the accused, but is determined by whether separate and distinct prohibited acts, made punishable by law, have been committed. *Caballero v. Hudspeth*, 114 F.2d 545, 547 (10th Cir. 1940). The filing of each false document would constitute a crime, and each should be alleged in a separate and distinct count of the indictment.

But appellee further argues that even assuming each count is duplicitous, such is harmless error. Two cases are relied upon to support this view; *Reno v. United States*, 317 F.2d 499 (5th Cir. 1963), and *United States v. Goodman*, 285 F.2d 378 (5th Cir. 1960). Neither case lends any credence to appellee's position. The *Reno* case actually held that the indictment was *not duplicitous*. That face alone distinguishes the *Reno case* from the one now under consideration, but that is not the only distinguishing factor. The district court in the *Reno* case, through its instruction to the jury, limited the trial strictly to a single charge. This limitation was repeated several times. No such limiting instruction was given in the instant case. And in the *Goodman* case, this court reversed a judgment dismissing all eight counts of an indictment. To the allegation of a duplicitous count, this court said that the error would be harmless if the United States were required to elect upon which charge it would proceed. But the United States was not required to make such an election in the instant case. It is true that appellant's counsel failed to request such an election, but appellant did move to dismiss the indictment—one of the grounds for such

motion being that counts one and two were duplicitous—and the motion was denied.

The failure to correct the duplicitous nature of the indictment in some manner was error. This becomes clear when you try to determine what the jury found. The jury cannot find a defendant guilty as to one of the offenses charged in the duplicitous count and not guilty as to the other charge in the same count; and a general verdict of guilty does not reveal whether the jury found the defendant guilty of one crime and not guilty of the others, or guilty of all of them. More specifically, it is impossible to determine whether the jury found appellant guilty of making, passing, uttering, and/or publishing Form 2004C, or doing so as to Form 2004G, or both.

The judgment is AFFIRMED as to count three. Since there is an approved procedure for submitting duplicitous counts by limiting instructions, the judgment, as to counts one and two, is REVERSED and REMANDED.

[TITLE OMITTED]

JUDGMENT

Before BELL, Circuit Judge, and INGRAHAM,* District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for

* Judge Cameron, the third judge constituting the Court originally hearing this case, died after argument but before decision. Consequently, this decision and opinion is rendered by a quorum pursuant to Title 28, USCA, Secs. 46(c) and (d).

the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court as to count three in this cause be, and the same is hereby, affirmed; and that the said judgment, as to counts one and two be, and it is hereby reversed; and that this cause be, and it is hereby remanded to the said District Court in accordance with the opinion of this Court.

Issued as Mandate: May 5, 1964

[TITLE OMITTED]

ON PETITION FOR REHEARING
(July 2, 1964)

Before BELL, Circuit Judge and INGRAHAM, District Judge PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is, hereby DENIED.